

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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Conservation Law Foundation, Inc.)	
)	Case No. <u>1:15-cv-70</u>
Plaintiff,)	
)	COMPLAINT FOR
)	DECLARATORY AND INJUNCTIVE
)	RELIEF AND CIVIL PENALTIES
v.)	
)	February 25, 2015
Merrymeeting Market & Marina)	
)	(Federal Water Pollution Control Act,
Defendant.)	33 U.S.C. §§ 1251 to 1387)
_____)	

INTRODUCTION

1. This is a civil suit brought by Plaintiff Conservation Law Foundation, Inc. (“CLF”) under the citizen suit enforcement provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (the “Clean Water Act,” “the Act,” or “CWA”) against Defendant Merrymeeting Market & Marina (“Merrymeeting Marina”). Plaintiff seeks declaratory judgment, injunctive relief, and other relief the Court deems appropriate to remedy Defendant’s violations of the Clean Water Act, which include past and ongoing unauthorized discharges of polluted stormwater associated with industrial activities at the water transportation and boat and ship building and repair facility located at 318 Merrymeeting Lake Road, New Durham, NH 03249 into waters of the United States, and Defendant’s failure to comply with the conditions of either an individual National Pollutant Discharge Elimination System (“NPDES”) discharge permit or the EPA Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity (“MSGP” or “Multi-Sector General Permit”).

2. Section 301(a) of the Clean Water Act makes “the discharge of any pollutant by any person [...] unlawful” except when in conformance with enumerated statutory provisions, including the requirement that a discharger obtain and comply with a NPDES permit under Section 402 of the Act. *See* 33 U.S.C. §§ 1311(a), 1342.

3. The EPA, in implementing its responsibilities to regulate stormwater pollution under the Clean Water Act, has specifically acknowledged the significant pollution problems associated with stormwater runoff from industrial facilities. To address these concerns, and to comply with its statutory obligations, EPA has established a NPDES permit program to regulate, and reduce the impacts of, stormwater pollution associated with industrial activities. EPA’s primary regulatory tool under this program is the Multi-Sector General Permit, although a discharger may instead seek coverage under an individual NPDES permit. Discharges of process wastewater, such as water resulting from the pressure washing of boat hulls, cannot be covered under the MSGP.

4. Defendant has operated and continues to operate a water transportation and boat and ship building and repair facility located at 318 Merrymeeting Lake Road, New Durham, NH 03249 (hereinafter “the Facility”) since at least 2009 and, upon information and belief, engages in industrial activities on the Facility such as material handling and storage, equipment maintenance and cleaning, industrial processing, vessel and equipment fluid changes, mechanical repairs, parts cleaning, sanding, blasting, welding, refinishing, painting, fueling, vessel and vehicle exterior washdown.

5. Defendant’s industrial activities are within the enumerated categories of industrial activity subject to the Multi-Sector General Permit and generate stormwater pollution that

is collected, channeled, and conveyed into Merrymeeting Lake, a water of the United States.

6. Defendant's pressure washing of boats generates process wastewater, the discharge of which cannot be covered under the Multi-Sector General Permit and can only be permitted under an individual NPDES permit. Upon information and belief, Defendant routinely discharged process wastewater from its power washing activity into Merrymeeting Lake at least until CLF notified Defendant of this violation of federal law on September 24, 2014.

7. Defendant's past and ongoing discharges of stormwater associated with industrial activity have at no time been authorized under either an individual NPDES permit or the applicable Multi-Sector General Permits, including the most recently issued (in 2008) Multi-Sector General Permit.

8. Defendant's discharges of process wastewater have at no time been authorized under an individual NPDES permit.

9. Defendant has operated, and continues to operate, its Facility in violation of the Clean Water Act.

JURISDICTION AND VENUE

10. This is a civil suit brought under the citizen suit enforcement provisions of Section 505 of the Clean Water Act, 33 U.S.C. § 1365. This Court has subject matter jurisdiction over the parties and this action pursuant to Section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), and 28 U.S.C. § 1331 (an action arising under the Constitution and laws of the United States).

11. On September 24, 2014, CLF notified Defendant of its intention to file suit for violations of the Clean Water Act, in compliance with the statutory notice requirements under Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1), and the corresponding regulations at 40 C.F.R. § 135.2.

12. More than sixty days have elapsed since the notice letter was served on Defendant, during which time neither the EPA nor the State of New Hampshire has commenced the diligent prosecution of a court action to redress the violations alleged in this complaint. 33 U.S.C. § 1365(b)(1)(B).

13. Venue is proper in the U.S. District Court for the District of New Hampshire pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located within this judicial district.

PARTIES

14. Plaintiff CLF, is a nonprofit, member-supported organization incorporated under the laws of Massachusetts with an office at 27 North Main Street, Concord, NH, 03301, and a principal place of business at 62 Summer Street, Boston, MA, 02110. CLF is a regional organization with more than 4,000 members, including more than 450 hundred in New Hampshire, and is dedicated to protecting New England's environment. CLF has a long history of working to protect the health of New England's and New Hampshire's waterways, including addressing the significant water quality impacts of stormwater pollution. CLF members use and enjoy New England's and New Hampshire's waterways for recreational and aesthetic purposes, including boating, swimming, fishing, hunting, and sightseeing, including but not limited to the waters of the United States affected by Defendant's activities: Merrymeeting Lake and downstream receiving waters. CLF

actively seeks federal and state agency implementation of the Clean Water Act and, where necessary, directly initiates enforcement actions on behalf of itself and its members.

15. Discharges of pollutants by Defendant adversely affect CLF members' use and enjoyment of Merrymeeting Lake and downstream receiving waters. The interests of CLF's members have been, are being, and will continue to be adversely affected by Defendant's failure to comply with the Clean Water Act and the Multi-Sector General Permit. The relief sought in this action will redress these harms. The unlawful acts and omissions described herein have and will continue to irreparably harm Plaintiff's members, for which harm they have no plain, speedy, or adequate remedy at law.

16. Defendant Merrymeeting Marina is a sole proprietorship operated by Russell Weldon and organized under the laws of the State of New Hampshire and maintains, operates, and is responsible for industrial activities at the Facility.

STATUTORY AND REGULATORY BACKGROUND

17. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), strictly prohibits the discharge of any pollutant into waters of the United States from a point source, unless the discharge complies with various enumerated sections of the Act. Among other things, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of a valid National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. Section 502(14) of the Clean Water Acts defines "point source" broadly to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock,

concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *See* 33 U.S.C. § 1362(14). Under the regulations implementing the Clean Water Act, the definition of “discharge of a pollutant” includes “additions of pollutants into waters of the United States from: surface runoff which is collected or channelled [sic] by man[.]” 40 C.F.R. § 122.2.

19. In 1987, Congress amended the Clean Water Act to require that facilities engaged in certain industrial activities obtain stormwater discharge permits. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat 7 (1987); *see* 55 Fed. Reg. 47990, 47991-93 (Nov. 16, 1990). Accordingly, Section 402 of the CWA directed the EPA to develop a phased approach for regulating stormwater discharges under the NPDES permitting program. 33 U.S.C. §§ 1342(a)(1), 1342(p)(2), 1342(p)(3)(A), 1342(p)(4), 1342(p)(6).

20. In 1990, in furtherance of the requirements of Section 402, the EPA promulgated regulations, set forth at 40 C.F.R. § 122.26, requiring industrial dischargers to submit applications for NPDES permit coverage no later than October 1, 1992. In establishing these regulations, EPA relied upon significant data showing the harmful effects of stormwater runoff on rivers, streams, and coastal areas across the nation. In particular, EPA found that runoff from industrial facilities contained elevated pollution levels. 55 Fed. Reg. 47990, 47991 (Nov. 16, 1990).

21. In September 1995, EPA issued a NPDES Storm Water Multi-Sector General Permit for Industrial Activities.

22. In October 2000, EPA re-issued the Multi-Sector General Permit. 65 Fed. Reg. 64746.

23. On September 29, 2008, EPA again re-issued the Multi-Sector General Permit. The 2008 Multi-Sector General Permit required all subject facilities to file a notice of intent (“NOI”) for coverage under the 2008 permit by January 5, 2009. 73 Fed. Reg. 56572; 2008 Multi-Sector General Permit, Table 1-2.
24. The 2008 MSGP expired by its terms on September 29, 2013 and has not yet been reissued.
25. To discharge stormwater lawfully, industrial dischargers must obtain coverage under the Multi-Sector General Permit and comply with its requirements or, alternatively, obtain coverage under an individual NPDES permit. Among those requirements, industrial dischargers must develop and implement a Stormwater Pollution Prevention Plan identifying and controlling sources of pollutants associated with industrial discharges from the subject facility, and file with the EPA a complete and accurate Notice of Intent (“NOI”) to be covered by the Multi-Sector General Permit.
26. Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), provides for citizen enforcement actions against any “person” who is alleged to be in violation of an “effluent standard or limitation . . . or an order issued by the Administrator or a State with respect to such a standard or limitation.”
27. Such enforcement action under CWA Section 505(a) includes an action seeking remedies for unauthorized discharges in violation of Section 301 of the Clean Water Act, 33 U.S.C § 1311, as well as for failing to comply with one or more permit conditions in violation of Sections 402 and 505(f) of the Act, 33 U.S.C. §§ 1342, 1365(f).

28. Each separate violation of the Clean Water Act subjects the violator to a penalty of up to \$37,500 per day per violation for all violations occurring after January 12, 2009. *See* 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.

FACTS

29. Since at least 2009, Defendant has operated, and continues to operate, a water transportation and boat and ship building and repair facility at 318 Merrymeeting Lake Road, New Durham, NH 03249.

30. The industrial activities at the Facility fall under Standard Industrial Classification (“SIC”) Codes 3732 (“boat and ship building and repair”) and 4493 (“water transportation”) and are among the sectors of industrial activity covered by the 2008 Multi-Sector General Permit (*see* 2008 Multi-Sector General Permit Appendix D), and/or the activities listed in 40 C.F.R. § 122.26(b)(14).

31. Upon information and belief, Defendant has engaged and continues to engage in the following industrial operations at the Facility: pressure washing; surface preparation; paint removal; sanding; painting; engine maintenance and repairs; fueling; material handling, transfer, storage and disposal; and shipboard processes improperly discharged to storm sewer or into receiving water.

32. Areas of industrial activity at the Facility are uncovered, and therefore exposed to precipitation.

33. Upon information and belief, the sources of pollutants associated with the industrial activities at the Facility include, but are not limited to: ramps, outfalls, catch basins, drains, boats and equipment left outdoors, the vehicles driving on and off the Facility, immediate access roads, and other conveyances to waters of the United States.

34. Upon information and belief, pollutants present in stormwater discharged from the Facility include, but are not limited to: paint solids, heavy metals, suspended solids, debris, spent abrasives, heavy metals, solvents, spent solvents, dust, low density waste (floatables), oil, ethylene glycol, acid/alkaline wastes, detergents, rags, fuel, trash, and other pollutants associated with the Facility's operations.

35. EPA considers precipitation above 0.1 inches during a 24-hour period a measurable precipitation event. 40 C.F.R. § 122.26(c)(i)(E)(6).

36. The 2008 Multi-Sector General Permit specifically references snowmelt as a form of stormwater discharge that must be addressed by a discharger in its control measures. 2008 Multi-Sector General Permit Part 2.1.2.1.

37. During every measurable precipitation event and every instance of snowmelt, water flows onto and over exposed materials and accumulated pollutants at the Facility, generating stormwater runoff associated with the Facility's industrial activity.

38. Upon information and belief, stormwater runoff from the Facility has been and continues to be conveyed an-made collection systems and conveyances and the operation of gravity into Merrymeeting Lake.

39. Merrymeeting Lake is a "water of the United States," as defined in 40 C.F.R. § 122.2, and therefore, a "navigable water," as defined in 33 U.S.C. § 1362(7).

40. Upon information and belief, stormwater runoff from the Facility is not adequately treated to remove the pollutants referenced in Paragraph 34, above, before it is discharged into Merrymeeting Lake.

41. Upon information and belief, Defendant has not met and continues to fail to meet the requirements to obtain authorization to discharge stormwater from the Facility under

the 2008, and prior, Multi-Sector General Permits, or under another valid NPDES permit for the Facility.

42. Upon information and belief, Defendant has not met and continues to fail to meet the requirements to obtain authorization to discharge process wastewater from the Facility under an individual NPDES permit for the Facility.

43. As of February 25, 2015, no Notice of Intent to seek coverage for discharges from the Facility has been posted on EPA's website, www.epa.gov/npdes/noisearch.

CLAIMS FOR RELIEF

First Cause of Action:

Unauthorized Discharge of Pollutants Into Waters of the United States

44. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

45. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), strictly prohibits the discharge of any pollutant from any "point source" to waters of the United States, except for discharges in compliance with a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

46. In order to be authorized to discharge stormwater lawfully under the Multi-Sector General Permit, an industrial discharger's facility must meet certain requirements as most recently set forth in Part 1.3.1 of the 2008 Multi-Sector General Permit. These requirements include:

- (a) Establishing eligibility for coverage under the permit;
- (b) selecting, designing, installing, and implementing control measures in accordance with Multi-Sector General Permit Part 2.1;

- (c) developing a complete and accurate Stormwater Pollution Prevention Plan in accordance with the permit's requirements; and
- (d) filing a complete and accurate Notice of Intent to seek coverage under the permit.

47. Defendant is an industrial discharger engaged in activities with SIC Codes of 4493 and 3732 and/or another activity listed under Appendix D of the Multi-Sector General Permit or 40 C.F.R. § 122.26(b)(14), which means that Defendant is obligated to apply for coverage under the Multi-Sector General Permit or obtain other legal authorization (such as an individual NPDES discharge permit) for its Facility.

48. Defendant's industrial activities at the Facility have resulted in, and continue to result in, "stormwater discharge associated with industrial activity," within the meaning of 40 C.F.R. § 122.26(b)(14), to waters of the United States on every day of precipitation greater than 0.1 inches and every instance of snowmelt.

49. Defendant's discharges of stormwater associated with industrial activity ("industrial stormwater discharges") are discharges of pollutants within the meaning of 33 U.S.C. § 1362(12).

50. Defendant's industrial stormwater discharges at the Facility are "point source" discharges into waters of the United States.

51. Industrial stormwater discharges at the Facility have caused and continue to cause discharges of pollutants to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

52. Since at least 2009, Defendant has discharged and continues to discharge industrial stormwater without authorization under a valid NPDES permit as required by

Clean Water Act Section 301(a), 33 U.S.C. § 1311(a), and Section 402 of the CWA, 33 U.S.C. § 1342.

53. Since at least 2009, Defendant has discharged process wastewater without authorization under a valid NPDES permit as required by Clean Water Act Section 301(a), 33 U.S.C. § 1311(a), and Section 402 of the CWA, 33 U.S.C. § 1342.

54. Each and every day on which Defendant has discharged and continues to discharge industrial stormwater or process wastewater from the Facility without authorization under a valid NPDES permit constitutes a distinct violation of Clean Water Act Section 301(a), 33 U.S.C. § 1311(a) and Section 402 of the CWA, 33 U.S.C. § 1342.

**Second Cause of Action:
Failure to Obtain a Permit for Industrial Discharges**

55. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

56. Defendant has been required to obtain permit coverage for its industrial stormwater discharges under each of the Multi-Sector General Permits issued by EPA, beginning with the 1995 Multi-Sector General Permit and including the 2008 Multi-Sector General Permit, or by seeking and obtaining an individual NPDES permit pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

57. Defendant has failed, and continues to fail, to obtain permit coverage under the 2008 Multi-Sector General Permit or any other iteration of the MSGP, or an individual NPDES permit for its Facility.

58. Defendant has been required to obtain permit coverage for its process wastewater discharges under an individual NPDES permit pursuant to Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

59. Defendant has failed to obtain permit coverage for process wastewater discharges under an individual NPDES permit for its Facility.

60. Each and every day on which Defendant has not had permit coverage for its Facility under the National Pollutant Discharge Elimination System is a separate and distinct violation of Clean Water Act Section 301(a), 33 U.S.C. § 1311(a) and Section 402 of the CWA, 33 U.S.C. § 1342.

**Third Cause of Action:
Failure to Comply with a Permit for Industrial Stormwater Discharges**

61. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

62. Dischargers of industrial stormwater are required at a minimum to comply with the requirements of the 2008 Multi-Sector General Permit, which include but are not limited to:

- A. Developing and implementing a complete and accurate Stormwater Pollution Prevention Plan which, in the case of the Defendant's Facility, would require a number of stormwater management measures and controls to meet numeric and non-numeric effluent limits;
- B. Submitting a complete Notice of Intent to be covered by the Multi-Sector General Permit, accompanied by a complete and accurate Stormwater Pollution Prevention Plan;
- C. Implementing required stormwater control measures;
- D. Conducting facility inspections (2008 Multi-Sector General Permit Part 4.1);

- E. Collecting wet-weather stormwater samples from each outfall at the Facility and inspecting same for indicators of pollution (2008 Multi-Sector General Permit Part 4.1);
 - F. Conducting annual comprehensive site inspections and submitting the results thereof to EPA (2008 Multi-Sector General Permit Part 4.2);
 - G. Complying with required benchmark monitoring and sampling procedures (2008 Multi-Sector General Permit Part 6.2.1);
 - H. Monitoring for all pollutants for which a receiving waterbody is impaired and for which a standard analytical method exists (2008 Multi-Sector General Permit Part 6.2.4);
 - I. Complying with reporting and recordkeeping requirements, including but not limited to reporting of any noncompliance during an applicable time period (2008 Multi-Sector General Permit Part 7);
 - J. Satisfying sector-specific requirements such as, in the case of Defendant's Facility, requirements pertaining specifically to water transportation and boat building and repair yards (2008 Multi-Sector General Permit Part 8, Subparts Q and R).
63. Defendant has failed, and continues to fail, to comply with the requirements of the Multi-Sector General Permit, including each of the requirements described above.
64. Each and every day on which Defendant has failed to comply with the Multi-Sector General Permit is a separate and distinct violation of Section 301(a), 33 U.S.C. § 1311(a), and Section 402 of the CWA, 33 U.S.C. § 1342.

RELIEF REQUESTED

65. Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

- (a) Declare Defendant to have violated and to be in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for its Facility's unlawful and unauthorized discharges of pollutants to waters of the United States;
- (b) Declare Defendant to have violated and to be in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, for its failure to obtain coverage under the Multi-Sector General Permit for the Facility;
- (c) Declare Defendant to have violated and to be in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, for its failure to comply with all applicable requirements of the Multi-Sector General Permit for the Facility;
- (d) Enjoin Defendant from discharging pollutants from the Facility into waters of the United States except as authorized by and in compliance with a National Pollutant Discharge Elimination Permit;
- (e) Order Defendant to comply fully and immediately with all applicable requirements of the Multi-Sector General Permit for the Facility;
- (f) Order Defendant to pay civil penalties of \$37,500 per day per violation for all violations occurring after January 12, 2009, for each violation of the Clean Water Act at the Facility pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a) and 40 C.F.R. §§ 19.1–19.4;

- (g) Order Defendant to take appropriate actions to remedy harm caused by Defendant's noncompliance with the Clean Water Act;
- (h) Award Plaintiff's costs (including reasonable investigative, attorney, witness, and consultant fees) as permitted by Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d); and
- (i) Award any such other and further relief as the Court may deem appropriate.

JURY DEMAND

Plaintiff does not request a jury trial.

Respectfully submitted this 25th day of February, 2015,

CONSERVATION LAW FOUNDATION, INC.

By its attorney,

/s/ Zachary K. Griefen
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